No. 20219

IN THE

United States Court of Appeals For the Ninth Circuit

PALMBERG CONSTRUCTION CO.,
an Oregon corporation,
Appellee,

v.

SIMPSON TIMBER COMPANY,
a Washington corporation,
Appellant.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

RYAN, ASKREN, CARLSON, BUSH & SWANSON
Attorneys for Appellant

Office and Post Office Address:
545 Henry Building
Seattle, Washington 98101

METROPOLITAN PRESS SEATTLE, WASHINGTON

SUBJECT INDEX

TABLE OF CASES

STATUTES

RULES AND TEXTBOOKS

IN THE

United States Court of Appeals For the Ninth Circuit

No. 20219

PALMBERG CONSTRUCTION CO.,
an Oregon corporation,
Appellee,
v.
SIMPSON TIMBER COMPANY,
a Washington corporation,
Appellant.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

JURISDICTION

The Palmberg Construction Company (hereinafter appellee) commenced this action on August 22, 1963, in the United States District Court, Western District of Washington, Southern Division. The appellee is an Oregon corporation, with its principal place of business in Astoria, Oregon (appellee's complaint, °Ct. p. 1).

°The clerk's Transcript of Record and the reporter's Transcript of Proceedings are not paginated consecutively. In order to avoid confusion, all references in this brief to the clerk's Transcript of Record are identified by the symbol Ct. and all references to the reporter's Transcript of Proceedings are identified by the symbol Rt.

The suit arose out of certain dredging work done by the appellee for the appellant at its Shelton, Washington, plant. The Simpson Timber Company (defendant in the trial court, hereinafter appellant) is a Washington corporation with its principal place of business in Washington (appellee's complaint, Ct. p. 1).

The appellee in its complaint alleged misrepresentation inducing the appellee to enter into a dredging contract. The amount in controversy exceeded $10,000.00. Jurisdiction in the trial court was based on the provisions of Title 28, U. S. Code, Section 1332.

Final judgment was entered after trial of the cause on April 15, 1965. The appellant now appeals from that judgment. Jurisdiction in this court is based on Title 28, U. S. Code, Sections 1291 and 1294, (1).

CONCISE STATEMENT OF THE CASE

During the year 1959, the appellant was planning a project at its Shelton, Washington, plant which entailed the filling of a portion of its waterfront property with materials to be dredged from the adjacent harbor area.

Appellee, a dredging contractor, after conducting its own investigation of the Shelton harbor area on at least two occasions (Rt., p. 80, ll. 4-5, Rt., p. 86, ll. 8-10) submitted a bid proposal in writing to do the filling requested by the appellant (defendant's Ex. A-1). This bid was dated the 29th day of December, 1959, and was accepted by the appellant's purchase order dated Janu-

ary 12, 1960 (defendant's Ex. A-3).

Although the contract provided that dredging would commence in January, 1960, appellee did not commence work until after the middle of February, 1960 (Rt., p. 441, ll. 14-15). In February of 1960 the appellant requested that the December 29 contract be modified to provide that the appellee would furnish a second dredge to the operation in order to assure that the filling would be completed no later than June, 1960 (plaintiff's Ex. 10). This modification was agreed to and operated upon by the appellee for the additional consideration provided in the modification. Plaintiff's Ex. 10 and plaintiff's Ex. 9, evidencing this modification, together with defendant's Ex. A-1 and defendant's Ex. A-3, constitute the written contract between the parties (Pretrial Order, Ct. p. 139).

The appellee, when preparing its bid proposal, expressly limited its obligations under the contract to the furnishing of certain equipment (including 1,500 lineal feet of pipeline) to do the work to be performed, which was described as:

> "We offer to perform dredging in areas designated by you in accordance with the following stipulated provisions:" (Appellee's December 29 bid proposal, defendant's Ex. A-1, p. 1.)

The contract which was prepared by the appellee (Rt., p. 91, ll. 20-22) provided that the appellant would furnish to the appellee cross sections of surveys prior to the time that dredging commenced. The contract prepared by the appellee made no mention of or refer-

ence to any other plans or specifications.

The appellee commenced its dredging and filling operations on February 17, 1960 (Rt., p. 441, ll. 14-15) and completed them on March 28, 1961 (Rt., p. 928, ll. 17-18), thirteen months after commencement and nine months after the promised date of completion.

Pursuant to the terms of the written contract, the appellee, during the course of its operations, submitted to the appellant monthly estimates of fill material placed by it and monthly payments were made to the appellee on the basis of these estimates. In October of 1960, some seven months after the appellee had commenced its operations, the appellant caused a survey of the fill to be made (plaintiff's Ex. 33). This survey revealed that the appellee's estimates of fill materials placed were about 80,000 yards in excess of materials actually placed and the appellant's payments to the appellee were correspondingly high. The results of this survey were given to the appellee (plaintiff's Ex. 11). About a month thereafter, the appellee's president, by letter to the appellant (plaintiff's Ex. 25), indicated that the work was more costly than the appellee had originally estimated, and suggested that:

> ". . . and we would appreciate after you have had the opportunity to give consideration to all factors pertaining to our dredging operations, discussing and analyzing further with you the *possible* reimbursement of some of our excess costs in connection with your project." (Plaintiff's Ex. 25.) (Emphasis added)

Subsequently, the appellee furnished to the appellant what purported to be its cost data (plaintiff's Ex. 14). After completion of the filling operations, negotiations continued for the purpose of determining if the appellee was entitled to compensation in addition to that provided for in the contract. The appellee took the position that it was entitled to additional compensation for the reasons that:

1. In the conduct of its dredging operations, it encountered debris in the nature of bark, limbs, swifter wire, sunken logs, buried piling, etc., which adversely affected its operations and which appellee alleged were not included within the contract, and

2. It was required to pump materials greater distances than provided for in the contract.

The appellant denied that the appellee was entitled to additional compensation for the given reasons because:

1. The contract between the parties expressly provided for the occurrence of debris and the appellee could not be entitled to additional compensation for that reason.

2. Any pumping of materials greater distances than 1,500 feet was the result of appellee's lack of skill and care in the planning of its operations.

3. The failure of the appellee to complete the work within the contract period and for delay in completion of almost nine months was because:

(a) the appellee's dredges were inadequate to do

the work;

(b) The appellee's dredges were improperly maintained; and

(c) That appellee improperly planned its operations.

Although it is the appellant's position that it suffered damages because of the appellee's failure to complete the operation within the period of time provided, it offered in settlement of the matter, payment to the appellee as provided for in the contract, without any offset because of damages suffered by the appellant (plaintiff's Ex. 16). This offer was rejected by the appellee and this law suit was commenced.

SUMMARY OF PLEADINGS, PRETRIAL MOTIONS AND ISSUES

In its complaint, the appellee alleged that it was induced to enter into the December 29 contract by representations of the appellant with respect to materials it would encounter during the course of its filling operations and representations of the appellant with respect to the location of the materials to be dredged. The appellee contended that these representations were untrue and that it therefore was entitled to recover the reasonable value of its work. The appellee further alleged that:

> "During the course of the work defendant (appellant) also requested and was granted some *minor* changes in the manner and sequence of the work performed." (Appellee's complaint, p. 3, Ct. p. 3.)

The appellant's answer denied the material allegations

contained in the appellee's complaint and counter-claimed against the appellee for damages incurred as a result of the appellee's failure to complete the work within the time provided (Ct. p. 7-10).

Subsequently the appellant brought the first of its motions for summary judgment in which it sought the court's ruling that the appellee's claim for relief, if any, based on fraud or misrepresentation was barred by the statute of limitations (Ct. p. 84). This motion was denied with leave to renew once the pretrial order had been entered (Ct. p. 129).

An extensive pretrial order subsequently was entered (Ct. pp. 137-214). As a part of this pretrial order the appellee stipulated:

> "That the plaintiff does not and will not make claim for relief in this action based on fraud or deceit on the part of the defendant." (Ct. p. 138)

In the pretrial order, the appellee raised as issues the existence of warranties arising as implied warranties from the contract itself or expressed warranties arising out of alleged statements of the appellant made prior to the execution of the contract. These warranties purportedly dealt with the matter of debris contained within the materials to be dredged and the location of materials to be dredged.

The appellee attempted to raise as additional issues:

1. An implied warranty on the part of the appellant of the accuracy of a certain diagram identified as plaintiff's Exhibit 2. This preliminary diagram indicated that

there were 350,000 yards of material available to be dredged within an enscribed area (the primary dredge area°) when, in fact, there were only 222,370 yards (plaintiff's Ex. 8). It is the appellant's position that this diagram was no part of the contract between the parties.

2. An implied promise by the appellant to pay the appellee additional compensation. The appellee contended this implied promise arose because the appellant discussed with the appellee its alleged grounds entitling it to additional compensation.

Following the entry of the pretrial order, the appellant brought its second motion for summary judgment before the Honorable George H. Boldt, who ruled (Ct. pp. 134-136) that the contract contained no warranties with respect to debris to be encountered by the appellee in its dredging operations, that the contract specifically provided for the occurrence of debris within the materials to be dredged, and that evidence inconsistent with the contract was inadmissible at the time of trial. By this same motion, the appellant sought to have the court rule that the diagram (plaintiff's Ex. 2) was inadmissible in evidence at the time of trial on the basis of the parol evidence rule. The court declined to so rule, but did order that no party could make mention of that diagram until the court had further ruled on its admissibility (Ct. pp. 134-136).

The cause was then moved to the Northern Division,

°Throughout the reporter's transcript of this brief there are references to certain areas of the Shelton harbor which were identified at the time of the trial. A diagram is provided at Appendix I of this brief to aid in understanding the geographical relationship of these areas.

Western District, of the United States District Court for the State of Washington for trial before Judge John C. Bowen.

After trial of the cause before the jury, judgment was denied on the appellant's cross-complaint and granted against the appellant and in favor of the appellee in the amount of $34,508.51. Prior to the submission of the cause to the jury (Rt. pp. 668 and 949), the appellant moved for a directed verdict, which motions were denied. Subsequent to return of the verdict, the appellant moved for judgment notwithstanding the verdict, or in the alternative for a new trial (Ct. pp. 244-c-246), which motions were denied. From these judgments and rulings, the Simpson Timber Company appeals.

SPECIFICATIONS OF ERROR

Assignment of Error No. 1

The trial court erred in giving the following portion of its statement of the case (which statement of the case was prepared by appellee):

> "This action was brought to recover for the amount allegedly remaining due plaintiff for the work. Plaintiff claims that it is entitled to the reasonable value of the work which it alleges is the sum of $274,885.00, including the 4% Washington State sales tax." (Court's Instructions, p. 2, ll. 22 through p. 3, l. 1)

Appellant objected to this portion of the court's statement of the case for the reason that there was no legal theory available to appellee which would entitle it to recovery for its estimate of reasonable value of the work, rather than the value placed in the contract.

Assignment of Error No. 2

In the trial court's statement of the case there is found the following language:

> "In particular plaintiff claims that under the contract its obligation was limited to the dredging of sand, gravel and cobbles to a maximum size of 8 inches and the furnishing only of approximately 1,500 lineal feet of pipeline for the work to be performed, but that during the course of the work it developed that there were great amounts of foreign material other than sand, gravel and cobbles in the area and included among the materials required to be dredged such as forest trash and debris, wire, boom chains, sunken logs, buried or submerged pilings." (Court's Instructions, p. 2-a, ll. 18 through p. 3, l. 3)

The appellant assigned error to the giving of this portion of the court's statement of the case for the reason that the court thereby submitted to the jury matters which had been previously determined by order of the court. The court in ruling on appellant's motion for summary judgment held that the contract between the parties specifically provided for the occurrence of debris within the materials to be dredged (Ct. pp. 135-136). The matter of said debris was not such as should be submitted to the consideration of the jury.

Assignment of Error No. 3

The trial court erred in giving its Instruction No. 7°

°At the time of trial, the appellant assigned error according to the instruction number assigned by the appellee in submitting instructions. These numbers do not correspond with the numerical designation on the instructions in the reporter's transcript. Appendix No. II indicates the relationship between the appellee's designation and the reporter's designation.

as follows:

> "You are instructed that the defendant had a duty to divulge to the plaintiff all relevant information which it had with reference to the location of the materials to be dredged, the nature of the materials to be dredged, and any substantial obstacles likely to be encountered in attempting to dredge the materials, which the defendant had in its possession, and that the plaintiff in submitting its proposal had the right to rely upon the reasonable belief that defendant had divulged all such relevant information in its possession." (Court's Instructions, p. 20, l. 17 through p. 21, l. 1)

The appellant objected to this instruction at the time of trial for the reason that it does not state the law. When parties are negotiating for the consummation of a contract, one party has no duty to reveal to the other party information known to it unless the first party should request that it be given all information known to the other or the other party has reason to know that the first party is laboring under a misapprehension of fact.

Assignment of Error No. 4

The trial court erred in giving its Instruction No. 20 as follows:

> "Should you determine that the plaintiff believed and was reasonably entitled to believe that under the contract it would not be required to dredge foreign materials other than sand, gravel and cobbles to the extent actually encountered, and if you further find that the defendant, or its agents, had information in their possession which indicated to them or should reasonably have indicated to them that there were in the materials to be dredged a substantial

amount of materials other than sand, gravel and cobbles which were not reasonably known to the plaintiff and that the defendant failed to disclose its information concerning them, notwithstanding that inquiry was made by the plaintiff which reasonably called for such information or disclosure, and if you further find that the plaintiff in conducting its dredging operations was reasonably and necessarily subjected to additional costs as a direct result of the dredging and encountering substantial quantities of such foreign materials, you should return a verdict in favor of the plaintiff and against the defendant for such extra costs and time loss as you may find directly resulted from such foreign materials being present to the extent not contemplated by the parties." (Court's Instructions, p. 30, l. 10 through p. 31, l. 6)

Appellant objected to the giving of this instruction at the time of trial for the reason that the matters contained therein had already been determined as a matter of law by the order of the court. It was erroneous and prejudicial to the appellant to submit said instruction to the jury.

Assignment of Error No. 5

The trial court erred in giving its Instruction No. 22 as follows:

"If you find that under the terms of the contract the plaintiff was not obligated to dredge any substantial quantities of materials other than sand, gravel and cobbles and if you further find that plaintiff was required by defendant to dredge substantial quantities of materials other than sand, gravel and cobbles not covered by the contractor (sic) you are instructed that in that event plaintiff would be entitled to recover additional compensation for its additional costs and time expended in dredging such foreign ma-

terials." (Court's Instructions, p. 32, ll. 15-24)

Appellant objected to this instruction at the time of trial for the reason that it leaves to the jury matters which had been theretofore determined as a matter of law, i.e. matters dealing with debris or materials other than sand, gravel and cobbles to be encountered by the appellee in its dredging operations.

Assignment of Error No. 6

The trial court erred in giving its Instruction No. 24 as follows:

> "If you are unable to determine alone from the written agreement of the parties whether or not the written agreement is complete and covered each and all of the terms agreed upon, you are permitted to consider the circumstances surrounding the formation of the agreement to determine whether or not it is full and complete.
>
> "When a written agreement is not complete upon its face or does not cover all of the terms and conditions agreed upon, resort may be had to other evidence to explain the agreement respecting the incomplete matters." (Court's Instructions, p. 33, ll. 15-25)

The appellant objected to this instruction of the trial court for the reason that it leaves to the determination of the jury which matters are covered or which matters are not covered within the contract. It is the law that the court must determine if an ambiguity exists in a contract. It is improper, erroneous and prejudicial to the appellant to leave to the jury the determination of whether or not an ambiguity exists in a written contract.

Assignment of Error No. 7

The trial court erred in giving its Instruction No. 25 as follows:

> "Should you determine that the language used in the written contract renders either the meaning or intent of the parties doubtful when given their ordinary meaning, you are then permitted to consider evidence of the surrounding circumstances to determine the true meaning and intent of that language, but in such event you shall not use evidence of those surrounding circumstances to vary or contradict the specific terms of the written instrument or instruments themselves." (Court's Instructions, p. 34, ll. 1-11)

The appellant objected to the giving of this instruction by the trial court for the reason that it leaves to the jury the determination of whether or not an ambiguity exists in the contract. It is for the court to determine whether an ambiguity exists.

Assignment of Error No. 8

The trial court erred in giving its Instruction No. 27 as follows:

> "To be enforceable in law a promise requires a valid consideration. To make a promise enforceable there must be either some reciprocal benefit running to the one who makes such a promise or some detriment to the one to whom such promise is made, and a promise without such consideration cannot be enforced.
>
> "Thus, if two parties have entered into a valid and enforceable contract and during the performance of it one promises the other to pay more money than originally agreed upon without the other prom-

ising to do any additional work or giving up any right or remedy which it might have, such a promise would not be enforceable.

"However, if during the performance of a contract, one of the parties has a right to avoid or rescind the contract and gives up that right in return for an express or implied promise to pay additional compensation, such a promise is enforceable." (Court's Instruction, p. 35, l. 10 through p. 36, l. 1)

The appellant objected to the giving of the above instruction by the trial court for the reason that said instruction was not supported by any evidence in the case, either circumstantial or direct.

Assignment of Error No. 9

The trial court erred in giving its Instruction No. 28 as follows:

"One party to a contract has no right to avoid that contract even though that party entered into the contract laboring under a mistake, unless that mistake was the result of a breach of duty which the party owed him. 'Mistake' means a state of mind that is not in accord with the fact.

"However, if when a contract is entered into both parties are laboring under a material fact assumed to be true by each of them as a basis on which they entered into the transaction, either party has a right to avoid or rescind the contract when he discovers that mistake if the effect of the mistake is to make the contract more onerous to him than it would otherwise have been.

"Under such circumstances the right to avoid or rescind a contract arises as soon as the mistake is or should reasonably have been discovered, and this right may form the consideration for the making of

a new or different promise, express or implied, by the other party." (Court's Instructions, p. 36, ll. 7-25)

The appellant objected to this instruction for the reason that the matters therein (the issue of mistake) was without the scope of the pleadings of the case, without the issues framed in the pretrial order and there was no substantial evidence submitted at the time of trial to support the instruction.

Assignment of Error No. 10

The court erred in admitting evidence over the objections of the appellant at the time of the trial relating to debris encountered by the appellee during the course of its dredging operations and the effect of that debris on its operations. The appellant at the time of trial objected to the admission of such evidence relating to debris, such as forest trash, sinker logs, swifter wires, buried or submerged pilings, bark, limbs, knots and other foreign objects encountered by the appellee during the course of its dredging operations within the materials to be dredged and the effect of that debris on the appellee's operations as follows:

"Mr. Bush: Going back to the order of Judge Boldt in this case, the question of admissibility of evidence respecting the subject of trash and debris was presented to Judge Boldt, and his order which we have referred to earlier this morning, I believe, provides, first, that the subject of debris is covered by the contract; that there is no express or implied warranty concerning the quantity of debris to be encountered; and, thirdly, that evidence at the time of trial, with respect to the issue of—I am looking now at the last

paragraph on page 2 of that order. It provides that:

> 'said contract contains no warranty with respect to the quantity of forest trash, sinker logs, swifter wires, buried or submerged piling, bark, limbs, knots, and other foreign objects to be encountered by the plaintiff.'

and then next:

> 'That all evidence of statements, agreements, representations made or claimed to have been made prior to or contemporaneous with the date of said contract which varies, adds to, modifies or is contrary to the provisions of said contract respecting debris, including evidence concerning quantities to be encountered is inadmissible at the time of trial.'

> "That order was entered on March 4, 1965. The plaintiff in his trial memorandum to the court, makes frequent reference to this matter of debris and we would request that the court admonish the plaintiff's counsel that this question is covered by this order and it is not a proper matter of evidence or argument to the jury." (Rt., p. 30, l. 23 through p. 32, l. 4.)

The appellant's objection was overruled by the court (Rt., pp. 39, l. 15 through p. 40, l. 4). The appellant excepted to this ruling as follows:

> "Mr. Bush: Could I ask then this exception be noted to that ruling, that a standing exception be considered to exist to any statements of counsel, or any examination of his witnesses respecting this subject matter of debris?

> "The Court: The court grants that request in toto. Did you hear the court's statement?" (Rt., p. 40, ll. 5-11)

Evidence introduced by the appellee relating to the matter of debris is found in the transcript at: Rt.,

p. 368, ll. 24-25; Rt., p. 369, ll. 19-22; Rt., p. 379, l. 14 through p. 382, l. 6; Rt., p. 383, l. 19 through p. 386, l. 20; Rt., p. 531, ll. 15-18; Rt., p. 533, l. 16 through p. 541, l. 24; Rt., p. 542, ll. 13-23; Rt., p. 548, l. 13 through p. 559, l. 6; Rt., p. 564, ll. 19-20; Rt., p. 631, l. 13 through p. 635, l. 25.

Assignment of Error No. 11

The trial court erred in overruling the appellant's objections to the admission in evidence of that certain diagram identified as plaintiff's Ex. No. 2 and all collateral evidence relating thereto.

The appellee sought admission of this diagram on the grounds that it identified the work appellee contracted to do.

The appellant urged as objections to the admission into evidence of plaintiff's Ex. 2, the following:

> "Mr. Bush: But, your honor, the parol evidence rule which I think is clear on this point would not permit the admissibility in a contract case, such as this, of conversations, documents, et cetera, occurring prior to the date of the written contract if the subject matter alleged to have occurred in such contracts is fully covered by the contract itself; and we submit, your honor that it is (Rt., p. 19, ll. 14-19)."

and again:

> "Mr. Bush: Your honor, I now object to the admission of either exhibit 1 or 2 in evidence in this case because it is clear, I believe, from the plaintiff's testimony, that neither of these docu-

ments were referred to in the contract which was subsequently entered into between the parties, and that, in fact, there was referred to and incorporated in that contract, reference to the location and quantities of materials which were to be removed (Rt., p. 92, ll. 14-22)."

These objections were overruled by the court (Rt., p. 93, ll. 16-19).

Plaintiff's Ex. 2 which contradicts the parties' written contract, is identified in substance at Rt., p. 134, l. 8 through Rt., p. 146, l. 5.

Assignment of Error No. 12

The trial court erred in refusing to grant the appellant's motion for a directed verdict pursuant to Rule 50, Federal Rules of Pleading, Practice and Procedure, made at the conclusion of the appellee's case in chief (Rt., p. 668, l. 2 through p. 669, l. 8).

The appellant urged as grounds for this motion the fact that the appellee had failed to submit evidence of any breach of contract on the part of the appellant and that the appellee had not submitted sufficient evidence for the case to go to the jury.

Assignment of Error No. 13

The trial court erred in refusing to grant the appellant's motion for a directed verdict made at the conclusion of all evidence (Rt., p. 949, ll. 7-14).

The appellant urged as grounds for this motion, the fact that the appellee had failed to produce evidence which would when taken in its entirety by a reasonable and competent person be construed to be sufficient to support the appellee's case.

Assignment of Error No. 14

The trial court erred in refusing to grant the appellant's post trial motion for judgment in accordance with a motion for directed verdict, or in the alternative, a new trial (Ct. p. 244 C through p. 244G). The appellant urged as grounds for this motion the following:

> "1. At the commencement of the trial of the above cause, the Court ruled, over the objections of the defendant, that the plaintiff would be allowed to introduce evidence dealing with matters relating to debris, such as, forest trash, sinker logs, buried or submerged piling, swifter wires, boom chains, bark, limbs, knots and other foreign objects, and the quantity thereof, which were encountered by plaintiff in its operations. Such evidence was admitted, over the continuing objections of the defendant, at the trial of the cause. The admission of such evidence was contrary to the specific order of the Court (March 24, 1965 Order Granting Partial Summary Judgment entered by Judge George H. Boldt). At the commencement of the trial, the Court ruled that such evidence would be admitted inasmuch as the plaintiff represented that evidence would be produced during the trial to prove that the defendant had withheld from the plaintiff, prior to the formation of the contract, information known to the defendant with respect to such debris. During the trial the plaintiff submitted no evidence, direct or circumstantial, that (i) the plaintiff requested information from the defendant respecting debris; nor (ii) that the defendant withheld information respecting debris from the plaintiff; nor (iii) that the matter of debris was not contemplated or provided for in the contract prepared by plaintiff. Consequently, the submission to the jury of evidence relating to debris was erroneous, prejudicial to the defendant, and adversely

affected the substantial rights of the defendant.

"2. The Court erred in admitting in evidence plaintiff's exhibit No. 2, for the reason that the same was not incorporated in the contract between the parties, was not necessary for the construction of, the interpretation of, or the resolution of ambiguities in said contract, if any, and as a consequence its admission in evidence was contrary to the parole evidence rule, prejudicial to the defendant, and adversely affected the substantial rights of the defendant.

"3. The plaintiff wholly failed to submit to the jury evidence of the amount of its damages, if any, and the jury's award of damages could only be based on conjecture and speculation, and could not in any manner be related to evidence produced at the trial.

"4. The plaintiff wholly failed to prove that it sustained any damages for which the defendant is responsible.

"5. The plaintiff wholly failed to prove any damages, or excess cost, resulting from changes in its work, or the method or manner of its operations, done at the request of the defendant and further, by plaintiff's own testimony, each of said changes were made and accepted as an exchange of consideration.

"6. The Court erred in giving the plaintiff's statement of the case for said statement gave to the jury's consideration matters that were removed from its consideration by the order of the Court entered on March 24, 1965. The Court further erred in giving said statement of the case for it submitted to the jury's consideration plaintiff's theory of damages based on the reasonable value of the entire work done by plaintiff, which theory of recovery is contrary to law.

"7. The Court erred in giving the plaintiff's instruction No. 5, for the reason that it is contrary to law, as indicated by the defendant's objection thereto made prior to the time that the jury retired to consider its verdict.

"8. The Court erred in giving the plaintiff's instruction No. 12, for the reason that it is contrary to law, as indicated by the defendant's objection thereto made prior to the time that the jury retired to consider its verdict.

"9. The Court erred in giving plaintiff's instruction No. 13, for the reason that it is contrary to law, as indicated by the defendant's objection thereto made prior to the time that the jury retired to consider its verdict.

"10. The Court erred in giving plaintiff's instruction No. 14, for the reason that it is contrary to law, as indicated by the defendant's objection thereto made prior to the time that the jury retired to consider its verdict.

"11. The Court erred in giving plaintiff's instruction No. 16, for the reason that it is contrary to law, as indicated by the defendant's objection thereto made prior to the time that the jury retired to consider its verdict.

"12. The Court erred in giving plaintiff's instruction No. 17, for the reason that it is contrary to law, as indicated by the defendant's objection thereto made prior to the time that the jury retired to consider its verdict.

"13. The Court erred in giving plaintiff's instruction No. 19, for the reason that it is contrary to law, as indicated by the defendant's objection thereto made prior to the time that the jury retired to consider its verdict.

"14. The Court erred in giving plaintiff's instruc-

tion No. 20, for the reason that it is contrary to law, as indicated by the defendant's objection thereto made prior to the time that the jury retired to consider its verdict.

"15. The Court erred in giving plaintiff's instruction No. 23, for the reason that it is contrary to law, as indicated by the defendant's objection thereto made prior to the time that the jury retired to consider its verdict.

"16. The Court erred in failing to instruct the jury of the proper construction of the contract between the parties, concerning the matters in issue, but instead, left to the jury the question of whether or not ambiguities existed in the contract.

"17. The verdicts of the jury are contrary to law.

"18. The verdicts of the jury are not sustained by a preponderance of the evidence.

"19. The verdicts of the jury are against the weight of the evidence.

"20. Under the pleadings and all of the evidence in the case, the verdicts should be in favor of the defendant."

Assignment of Error No. 15

The verdict of the jury (Ct. p. 244) granting judgment against the appellant and in favor of the appellee in the amount of $34,508.51 is erroneous for the reason that the same is manifestly against the weight of the evidence submitted at the time of trial.

Assignment of Error No. 16

The verdict of the jury denying the appellant's coun-

terclaim against the appellee (Ct. p. 242) was against the weight of the evidence and was manifestly incorrect.

SUMMARY OF ARGUMENTS ON ASSIGNMENTS OF ERROR

The appellant's arguments on assignments of error can be divided into three categories. These are: 1. Errors of the court in allowing the appellee to introduce evidence which was prejudicial to the appellant and which should have, as a matter of law, been excluded; 2. Instructions of the court to the jury propounded by the appellee which either were not supported in any degree by the evidence or did not state the applicable law; and 3. The failure of the court to grant any of the appellant's motions for directed verdict on the grounds that the appellee had not introduced any competent or credible evidence to support its right to recovery against the appellant. In addition, the appellant appeals from the verdict of the jury denying its right to recovery from the appellee on its counterclaim.

The trial court allowed the appellee to introduce into evidence a certain diagram (plaintiff's Ex. 2) which, according to the appellee's theory, was the plan for the work it was to perform. On the basis of the diagram, which contained an error, the appellee then argued that it was required to do work which was not provided for in the contract. That the court erred in admitting this diagram is without question. The written contract between the parties specifically incorporated by reference

surveys and cross sections of the work to be performed by the appellee. The written contract did not make reference, even collaterally, to the diagram (plaintiff's Ex. 2). The diagram did contradict and modify the written contract. It should have been excluded on the basis of the parol evidence rule. The admission into evidence of this diagram constituted prejudicial error to the appellant for the reason that the appellee's case was substantially based upon it.

The trial court also erred in admitting into evidence any testimony of the appellee relating to matters of debris encountered in its dredging operations. The court had ruled in construing the contract, prior to the time of trial, that the contract specifically provided for the occurrence of debris in the appellee's dredging operations, and that the written contract contained no warranties with respect to the amount of debris that the appellee might encounter. The appellee's counsel, then, in order to circumvent the order of the court, represented to the trial judge that the appellee desired to introduce evidence of debris simply for the purpose of showing a breach of a duty on the part of the appellant (i.e. that the appellant had failed to reveal to the appellee all it knew about subsurface conditions). However, no such showing was made. In fact, the appellee's counsel did not even attempt to elicit evidence which would support a conclusion that the appellant had failed to reveal to the appellee all it knew about subsurface conditions. Appellee did, however, introduce extensive evidence dealing with the debris it encountered and the effect such

debris had upon its operations and costs. Clearly, the appellee was not entitled to be paid more than once for what it contracted to do. The written contract provided for the occurrence of debris in the appellee's operations and all evidence relating to debris should have been excluded.

Many of the instructions of the court to the jury were erroneous and prejudicial to the appellant as a matter of law. The court's instruction No. 28 dealing with the matter of mistake, the court's instruction No. 7 dealing with duty of appellant to reveal information to appellee and the court's instruction No. 27 dealing with appellee's right to enforce the contract because of an implied or expressed promise to pay additional compensation are instructions not supported by even a scintilla of evidence in the record. Under Washington law, the giving of an instruction which is not supported by substantial evidence is prejudicial error as a matter of law.

In addition, the court's instructions on construction of contracts (Nos. 24 and 25) and duty to reveal information (Nos. 7 and 20) do not state the law. The court's instruction No. 22 in effect instructed the jury that it might find that the appellee was not, under the terms of the written contract, expected to encounter any debris at all; this is in opposition to the clear provision in the contract providing for the encountering of debris. The court's statement of the case was erroneous for it put to the jury's consideration matters which should have been excluded, and legal theories of the appellee which were

not supported by the evidence.

At three occasions during the course of the trial the appellant moved for a directed verdict on the grounds that the appellee had failed to introduce any competent evidence to support its right to recovery from the appellant. These motions were denied. An examination of the record demonstrates that these motions should have been granted. The appellee introduced no competent evidence to support its right to a recovery from the appellant.

Lastly, the appellant introduced at the time of trial uncontroverted evidence of the damages it sustained because of the appellee's failure to complete the work within the time provided. The jury's failure to award the appellant damages against the appellee because of this breach of contract was clearly error.

ARGUMENT ON ASSIGNMENTS OF ERROR NOS. 1 AND 2

The Court's Statement of the Case Was Inaccurate and Submitted to the Consideration of the Jury Matters Which Should Have Been Excluded as a Matter of Law.

The statement of the case presented to the jury by the trial judge contained a synopsis of the plaintiff's claim for relief as follows:

> "Plaintiff claims that it is entitled to the reasonable value of the work which it alleges is the sum of $274,885.11" (Court's Instructions, p. 1, l. 24 through p. 2, l. 1).

The statement of the case presented to the jury by the trial judge was prepared by the appellee and accepted by the trial judge. It was error on the part of the trial judge to give the above statement. It is clear from an examination of the issues, both in the pretrial order and those actually presented through the trial, that the appellee's claim for relief was grounded upon alleged extra work it was caused to do, because, according to the appellee's theory, certain plans were not accurate, the work was more difficult than anticipated, and lastly on the ground that the appellee did extra work specifically at the request of the appellant.

The law of the State of Washington is clear (assuming the appellee is correct) that where plans and specifications lead a contractor to assume that conditions are different than actually encountered in the performance of the work, the contractor is entitled to compensation for the extra work or expense made necessary by conditions being otherwise than as so represented.

Maryland Casualty Co. v. City of Seattle, 9 Wn.2d 666, 116 P.2d 280 (1941). See also: *Hollerbach v. United States,* 233 U.S. 165, 34 Sup. Ct. 553 (1914); *U. S. v. Atlantic Dredging Co.,* 253 U.S. 1, 40 Sup. Ct. 423 (1919); *Walla Walla Port District v. Palmberg,* 280 F. 2d 237 (9th Cir. 1960).

Under the above rule of law, it is clear that the appellee was only entitled to recover the actual extra expense it incurred, if any; not what it considered to

be the reasonable value of the entire job. Consequently, it was error to submit to the jury the appellee's completely unsupported theory that it was entitled to be compensated for what it considered to be the reasonable value of the entire work.

The court's statement of the case was further erroneous and prejudicial because it put to the jury's consideration the appellee's contention that it was required to dredge material (debris) not provided for in the written contract between the parties. The contract is clear. The possibility of the appellee's encountering debris was provided for by express stipulation (defendant's Ex. A-1). The appellee could not by any theory be entitled to additional compensation for doing that which it was required to do under the contract.

The prejudice to be found in the above statement of the case by the court is apparent on its face. By submitting to the jury the appellee's theory of recovery for the reasonable value of the work, together with what the appellee considered to be the reasonable value of the work, the court put into the jury's hands a measure of recovery which the appellee did not and could not support by any factual evidence, or sustain by any theory of law. In addition, the court submitted for the jury's consideration an item of alleged damage (i.e. debris) that the appellee could not and did not support, which was covered by the contract and which the court had earlier ruled (Ct. pp. 134-136) was not and could not be an item of damage to the appellee. Such a statement is prejudicial.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 3

The Court's Instruction No. 7 Is Contrary to Law and Is Not Supported By Any Evidence in the Record.

The trial court's Instruction No. 7 given to the jury instructs the jury that the appellant had an unqualified duty to divulge to the appellee all relevant information which it had with reference to the location of materials to be dredged or the nature of the materials to be dredged or any substantial objects to be encountered. This instruction does not state the law.

> "Ordinarily the duty to disclose a material fact exists only where there is a fiduciary relationship, and not where the parties are dealing at arm's length." *Oaks v. Taylor*, 31 Wn.2d 898, 903, 199 P.2d 924, 927 (1948)

In *Oaks v. Taylor, supra,* the Washington State Supreme Court stated as follows:

> "It will thus be seen that the duty to speak does sometimes arise when the parties are dealing at arm's length. That duty arises where the facts are peculiarly within the knowledge of one person and could not be readily obtained by the other; or where, by lack of business experience of one of the parties, the other takes advantage of the situation by remaining silent. However, a party cannot be permitted to say that he was taken advantage of, if he had means of acquiring the information, or if because of his business experience or his prior dealings with the other, he should have acquired further information before he acted." 31 Wn.2d at p. 904, 199 P.2d at p. 928

Instruction No. 7 of the trial court places upon the appellant in the eyes of the jury, an unqualified obli-

gation on the part of the appellant to divulge all that it knew about the instructed matters. Such an instruction under the above stated rule of law amounts to a finding of fact by the trial court:

1. That facts with respect to the matters included within the instruction were peculiarly within the knowledge of the appellant, and/or

2. That the appellee did in fact make inquiry and/or

3. That the facts with regard to such matters could not have been ascertained by the appellee by a reasonable investigation.

Each of the above, even if they existed as issues in the law suit would be matters of fact to be determined by the jury. The court's instruction No. 7 which implicitly finds these facts adversely to the appellant is clearly erroneous and prejudicial to the appellant for that reason alone. It is, as indicated above, also erroneous and prejudicial to the appellant for it does not properly state the law with respect to the duty to speak.

The instruction No. 7 is further erroneous and prejudicial for the reasons that:

1. There is no evidence in the record that the appellee made inquiry of the appellant with respect to the matters included within the instruction;

2. There is no evidence in the case that the appellant had knowledge with respect to such matters which it

did not reveal to the appellee.

The last item is particularly pertinent for the reason that there is absolutely no testimony by any party, either the appellee or the appellant, or other evidence of any nature, that the appellant did not reveal or give to the appellee all information it had with respect to the debris to be encountered by the appellee in its dredging operations. The record clearly proves that the appellant did in fact reveal to the appellee all information it had with respect to the location of materials to be dredged. This is evidenced by the fact that the accurate cross-sections of the areas to be dredged were given to the appellee *prior to the time that dredging commenced* (as required by the written contract, defendant's Ex. A-1).

3. There is no evidence that the appellee either did not know all the pertinent information with respect to the instructed matters or could not have acquired it by reasonable inspection. In matter of fact, the appellee's own superintendent testified that the materials encountered in the nature of debris were normal to dredging operations conducted in similar areas. (Rt. p. 559, l. 17, through p. 560, l. 23; p. 548, ll. 13-17.)

The court's Instruction No. 7 is further prejudicial to the appellant for the reason that it is inconsistent and confused the jury.

In the court's Instruction No. 20, the court instructed the jury:

"... if you further find that the defendant or its

agents had information in their possession, which indicated to them or should reasonably have indicated to them that there were in the materials to be dredged a substantial amount of materials other than sand, gravel and cobbles which were not reasonably known to the plaintiff and that defendant failed to disclose this information concerning them, notwithstanding that inquiry was made by the plaintiff which reasonably called for such information or disclosure . . ." (Court's Instructions, p. 30, ll. 15-24)

Under this instruction, the court instructs that a duty arises when inquiry is made. Yet Instruction No. 7 instructs that the appellant had an unqualified duty. These instructions are confusing and inconsistent and therefore erroneous and prejudicial to the appellant.

Both Instruction No. 7 and Instruction No. 20 are prejudicial to the appellant as a matter of law for the reason that there is no evidence in the record which would support either instruction. In order for the jury to be instructed with respect to a duty or failure of the appellant to perform a duty owed to the appellee there must be substantial evidence in the record from which the jury could find that the appellant did not perform that duty. The duty which the appellee attempted to urge as breached by the appellant was the alleged failure to reveal information with respect to the location of the materials to be dredged or the amount of debris to be encountered by the appellee in its dredging operation.

1. There is no evidence in the record that the appellant failed to reveal to the appellee any information

that it had.

2. There is no evidence in the record to support a conclusion that the appellee in fact made inquiry of the appellant with respect to these matters which was not truthfully and completely answered. This is especially true with respect to the matter of debris.

Since there is no substantial evidence in the record to support these instructions, giving of them is erroneous and prejudicial as a matter of law.

Shipp v. Curtis, 318 F.2d 797 (9th Cir. 1963); *Greyhound Corporation v. Blakley,* 262 F.2d 401 (9th Cir. 1958); *Hughey v. Winthrop Motor Co.,* 61 Wn.2d 227, 377 P.2d 640 (1963); *Leavitt v. DeYoung,* 43 Wn. 2d 701, 263 P.2d 592 (1953); *Albin v. National Bank of Commerce of Seattle,* 60 Wn.2d 745, 375 P.2d 487 (1962).

ARGUMENT ON ASSIGNMENTS OF ERROR NOS. 4 AND 5

The Court in Its Instructions Nos. 20 and 22 Ignored the Clear Unambiguous Langnage of the Contract and Prior Orders of the Court Construing the Contract. These Instructions Are Not Supported By Any Evidence in the Record.

The court erred in giving its Instructions Nos. 20 and 22. These instructed the jury that if the jury should find that the appellee was not required to dredge materials other than sand, gravel and cobbles (such as debris) in greater amounts than it had anticipated at the time the contract was formed (Instruction No. 20),

or that if the appellee was required to dredge materials in any substantial quantities other than sand, gravel and cobbles, the appellee would be entitled to recover from the appellant (Instruction No. 22).

At the time of the trial, the appellant objected to these instructions on the ground that they included matters that had been determined as a matter of law. The ruling of the court (Ct. pp. 135-136) provided in part:

> "It is hereby ordered, adjudged and decreed: that the written contract, which is identified as Exhibits 1, 2, 3 and 4 of the pretrial order herein provides for the possibility of the plaintiff's encountering debris in the dredging operations therein contracted to be performed by the plaintiff, and that said contract contains no warranty with respect to the quantity of forest trash, sinker logs, swifter wires, buried or submerged piling, bark, limbs, knots, and other foreign objects to be encountered by the plaintiff."

Clearly, the above ruling of the court is correct. The plain, unambiguous language of the contract provides:

> "5. Payment for dredging shall be on the following basis:
>
> "a. . . .
>
> "b. An hourly rental rate per operating hour based on the average number of cubic yards dredged per operating hour as computed by surveys made before and after dredging, as follows: . . .
>
> "An operating hour is an hour during which the dredge crew is engaged in the normal functions

> necessary to operation of the dredge, *including time for clearing debris from the dredge cut, dredge cutter, dredge pump or dredge pipelines, . . .*" (emphasis added)

(A summation of the appellee's evidence with respect to debris and its effect on its operations was concerned with the time required to clear debris from the dredge cut, dredge pump, dredge pipelines, all of which are covered by the contract.)

It is a fundamental axiom of the law that:

> "Where one agrees to do a thing for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation because unforeseen difficulties are encountered (citing cases) . . ."

Spearin v. United States, 248 U. S. 132, 136, 39 Sup. Ct. 59 (1918). See also: *Maryland Casualty Co. v. City of Seattle, supra,* where the above statement of law is quoted with approval.

The contract specifically provides for a method of payment to the appellee for debris encountered. The appellee was paid on a sliding scale based upon the number of operating hours it incurred while doing the work. Time loss due to debris encountered was included within the operating hours. There was no limit to the amount of time loss due to debris that could be included.

Even assuming that the appellee did in fact encounter more debris in its operations than it anticipated (a fact which is not supported by the record), it would

not, under the above rule of law, be entitled to additional compensation because of such debris.

These Instructions (Nos. 20 and 22) are especially erroneous and prejudicial for the reason that the court had previously ruled as a matter of law that the subject matter of the instructions was specifically covered by the contract between the parties (Ct., pp. 134-136). Consequently, the above instructions leave in the hands of the jury at the instance of the trial judge, an item of alleged damages for which the appellee could not as a matter of law be compensated. The instructions have the effect of making the appellee's subjective understanding prevail over its objective manifestation of assent. Such instructions are erroneous, prejudicial and constitute reversible error. *Lasser v. Grunbaum Bros., Etc.*, 46 Wn.2d 408, 291 P.2d 832 (1955).

ARGUMENT ON ASSIGNMENTS OF ERROR NOS. 6 AND 7

It Is the Law That the Court and Not the Jury Must Determine If an Ambiguity Exists in a Written Contract. The Court's Instructions Nos. 24 and 25, However, Leaves to the Jury the Determination of Whether or Not an Ambiguity Exists in the Written Contract.

It is the law that it is the duty of the court and not the jury to determine if a contract or its terms are ambiguous.

> "It is immaterial if true, that appellee's counsel conceded in the trial court that the language of paragraphs 6 and 11 is ambiguous. Whether the language is ambiguous or not is a question of law."

Golden Gate Bridge & Highway Dist. v. United States, 125 F.2d 872, 875 (9th Cir. 1942). See also: *Severson v. Fleck,* 251 F.2d 920 (8th Cir. 1958)

The law of the State of Washington is:

> "Ordinarily the construction or legal effect of a contract must be determined by the court as a question of law. 17 C.J.S. 1279." *Bellingham Etc. v. Bellingham Coal Mines,* 13 Wn.2d 370, 381, 125 P.2d 668, 675 (1942)

and:

> "It is the function of the court to examine the contract to determine whether it is so ambiguous or incomplete as to admit of parol evidence to ascertain the intent of the parties." *Washington Etc. v. Halferty Etc.,* 44 Wn.2d 646, 659, 269 P. 2d 806, 814 (1954)

The only ruling of the court with respect to the terms and meaning of the contract was that contained in the above-mentioned order of Judge George H. Boldt upon appellant's motion for summary judgment (Ct. pp. 134-136), that the contract specifically provided for the occurrence of debris in the course of the appellee's dredging operations. It is a fundamental principle of law that a party to a written contract is entitled to have that contract enforced according to its terms.

To submit to a jury a clear and unambiguous contract under instructions that they are entitled to find any ambiguities in that contract that they please is to deprive a party of his right to have that contract enforced.

The court's Instructions Nos. 24 and 25 have this

effect. These instructions do not set out ambiguities that exist in the contract and request the jury's determination thereof, but on the contrary *they leave to the jury the power to determine if in fact an ambiguity exists.* These instructions are totally erroneous and prejudicial to the appellant. Their effect is to give the jury a judicial commission to rewrite the contract between the parties.

> "We have often said that the courts will not interpret the meaning of an unambiguous contract." *Schwieger v. Robbins & Co.*, 48 Wn.2d 22, 24, 290 P.2d 984, 986 (1955)

> "Neither will the court permit parol evidence to establish an ambiguity in a written contract." *Washington, Etc., v. Halferty, Etc., supra.*

It is the law of the State of Washington that, under proper circumstances, construction of a written contract is submitted to the jury as a question of fact. These circumstances arise where the fact of an ambiguity has been established and:

> "Where it is an enforcible contract, and the ambiguity arises as to the relative responsibilities and duties of the respective parties under the contract, which responsibilities and duties can be determined either by proof of the meaning of the terms used in the contract or by showing of the circumstances surrounding the parties with reference to the subject-matter of the contract at the time it was entered into, and there is any controversy over such facts, undoubtedly such contracts should be submitted to the jury, and its meaning determined by that tribunal by aid of such explanatory testimony." *Keeter v. John Griffiths, Inc.*, 40 Wn.2d

128, 130, 241 P.2d 213, 214 (1952), citing from *Duran v. Heney,* 33 Wash. 38, 41, 73 Pac. 775, 776 (1903)

Where, as in the present case, the court does not find an ambiguity *existed within the contract,* the proper circumstances for the submission to the jury of an ambiguity in a contract do not exist. It is the appellant's position that the contract between it and the appellee is clear and unambiguous, particularly with respect to the matter referred to within the court's Instructions Nos. 24 and 25. Appellant entered into that contract in good faith and it is entitled to have the contract enforced according to its clear terms.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 8

The Court's Instruction No. 27 Is Not Supported By Any Evidence in the Record.

The trial court erred in giving its Instruction No. 27. In this instruction the court instructed the jury that if one party to a contract had a right to avoid or rescind a contract and gives up that right in return for an implied or expressed promise to pay additional compensation, such a promise is enforceable.

To support such an instruction there would have to be evidence in the record that the appellant made either an expressed or implied promise to pay the appellee additional compensation. It would further have to be shown that this expressed or implied promise was made when the appellee was either threatening to or did in fact have a right to rescind the contract. *There is*

no such evidence in the record.

The appellee never threatened to, attempted to, or claimed a right to avoid or rescind the contract. In matter of fact, the only request of the appellee to the appellant for additional compensation during the time the contract was being performed is found in its letter of November 3, 1960 (plaintiff's Ex. 25) (written some four months prior to the completion of the job) as follows:

> "The cost data which we submitted to you last week indicates that our cost will be considerably in excess of our income on your project; and we would appreciate after you have had an opportunity to give consideration to all factors pertaining to our dredging operations, discussing and analyzing further with you the *possible* reimbursement of some of our excess costs in connection with the project." (Plaintiff's Ex. 25.) (Emphasis added)

This letter is not a demand for additional compensation as a matter of right, or a notification to the appellant that the appellee intended to avoid or rescind the contract. It is simply what it purports to be. The appellee was requesting the appellant to pay it additional compensation, *not as a matter of right but because the appellee was losing money.* The record of evidence submitted at the trial of this cause does not support even by inference a promise, either expressed or implied, on the part of the appellant to pay the appellee more money than the contract provided for. Consequently, the court's instructions that the appellee would be able to enforce a promise to pay additional

compensation by appellant is not supported by substantial evidence in the record and is prejudicial to the appellant.

The gravamen of this instruction is that it invites the jury to find that such an expressed or implied promise was made or to consider that the evidence might infer a promise. An instruction not supported by substantial evidence is as a matter of law prejudicial error.

Shipp v. Curtis, supra; Greyhound Corporation v. Blakley, supra; Hughey V. Winthrop Motor Co., supra; Leavitt v. De Young, supra; Albin v. National Bank of Commerce of Seattle, supra.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 9

The Court's Instruction No. 28 Is Contrary to the Pleadings, the Pretrial Order, and Is Not Supported By Any Evidence in the Record.

Appellee in its complaint did not allege or set out with particularity any averment of mistake as required by Federal Rules of Civil Procedure, Rule No. 9. Nor did the appellee raise any issue of mistake in the pretrial order (Ct., pp. 187-189). There was no evidence presented in the trial of the case which would support an instruction on mistake. Yet the trial court gave its Instruction No. 28 purportedly instructing the jury on the law of mistake. This instruction was erroneous and prejudicial as a matter of law.

Under the laws of the State of Washington, the right to avoid or rescind a contract for mistake arises when

there is a clear and bona fide *mutual mistake* regarding the material fact. *Ross v. Harding,* 64 Wn.2d 231, 391 P.2d 526 (1964); *Stahl v. Schwartz,* 67 Wash. 25, 120 Pac. 856 (1912); *Lindeberg v. Murray,* 117 Wash. 483, 201 Pac. 759 (1921); *Sutton v. Peterson,* 193 Wash. 175, 74 P.2d 884 (1938).

There is no substantial evidence in the record to support an instruction on the law of mistake. The giving of an instruction which is not supported by substantial evidence is prejudicial error under Washington law. *Shipp v. Curtis, supra; Greyhound Corporation v. Blakley, supra; Leavitt v. DeYoung, supra; Albin v. National Bank of Commerce of Seattle, supra.*

The prejudicial nature of such an instruction is easily recognized. A finding of a bona fide mutual mistake would clearly be beneficial only to the appellee. The court by lending its sponsorship to this instruction infers that such an issue might exist. The inevitable consequence is that the jury is detracted from the genuine issues in the case and led by the court to find in a fashion beneficial to the appellee.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 10

The Court Erred in Admitting Any Evidence Regarding Debris Encountered By the Appellee in Its Dredging Operations

Prior to the giving of opening statements to the jury in the above matter, the appellant raised the question to the trial court of the appellee's apparent purpose to ignore the order of Judge George H. Boldt granting the

appellant's summary judgment in part and ruling that the contract provided for the occurrence of debris during the appellant's dredging operations (Rt., p. 30 et seq.). The appellee argued at that time that its only purpose in submitting evidence on the matter of debris was that it intended to show a breach of duty on the part of the appellant to reveal to the appellee all that it knew about subsurface conditions (and presumably debris) and that it requested a ruling that it be permitted to introduce evidence relating to debris on the basis of the 9th Court of Appeals holding in the case of *Walla Walla Port District v. Palmberg, supra.* Specifically, the appellee represented to the court:

> ". . . we still have a right to show an implied warranty and duty on behalf of the defendant to divulge to us what knowledge it may have had on that issue . . ." (Statement of appellee's counsel to the court, Rt., p. 32, ll. 24-25.)

The trial court in this case ruled that the appellee could introduce evidence relating to the matter of debris *simply to show a breach of a duty on the part of the appellant* (Rt., p. 40, l. 21 through p. 42, l. 22).

The ruling was objected to by the appellant (Rt., p. 40, ll. 4-9). This objection was put in the form of a continuing objection to the introduction of any evidence relating to debris encountered by the appellee in its dredging operations, or any mention of debris. The appellant then at various times during the trial reiterated its objection and notified the court that its objection still continued (Rt., p. 380, ll. 9-15; p. 384, ll. 13-18).

The trial court then admitted extensive evidence introduced by the appellee relating to the debris it encountered such as sticks, limbs, knots, sinker logs, buried piling, etc. and the effect of this debris on its dredging operations. (Rt., p. 368, ll. 24-25; Rt. p. 369, ll. 19-22; Rt., p. 379, l. 14 through p. 382, l. 6; Rt., p. 383, l. 19 through p. 386, l. 20; Rt., p. 531, ll. 15-18; Rt., p. 533, l. 16 through p. 541, l. 24; Rt., p. 542, ll. 13-23; Rt., p. 548, l. 13 through p. 559, l. 6; Rt., p. 564, ll. 19-20; Rt., p. 631, l. 13 through p. 635, l. 25).

The appellant's objection to the introduction of this evidence is that the appellee is not entitled to additional compensation for matters that were included in the contract. The court had previously ruled that debris was provided for in the contract (Ct. pp. 134-136). There is little doubt but that debris encountered by the appellee in its operations caused it hardship and increased costs. The jury could not have failed to be influenced by this evidence. But the fact that the appellee provided for the occurrence of debris in its contract is conclusive evidence that the appellee included such hardship and increased costs in its contract price. As a matter of law, the appellee is not entitled to additional compensation because of that debris. The introduction of such evidence was prejudicial to the appellant for it put into the jury's consideration an alleged item of damage that should have been excluded.

The admission of such evidence was further erroneous and prejudicial because it was, according to the appel-

lee's request, admitted only for the purpose of showing a breach of duty on the part of the appellant as a failure to tell all it knew. Yet the appellee introduced only evidence to show the debris it encountered. THE APPELLEE SUBMITTED NO EVIDENCE THAT THE APPELLANT HAD FAILED TO DIVULGE ALL IT KNEW ABOUT SUBSURFACE CONDITIONS. THE APPELLEE MADE NO EFFORT TO PRODUCE EVIDENCE TENDING TO PROVE THAT THE APPELLANT FAILED TO DIVULGE ALL IT KNEW ABOUT SUBSURFACE CONDITIONS.

In the *Walla Walla Port District v. Palmberg* case, *supra*, the basis on which the appellee requested a ruling that it be allowed to introduce evidence relating to debris, the 9th Court of Appeals held, at p. 245:

> "Our review of the record satisfied us that there was sufficient evidence upon which the jury could reasonably find:
>
> "(4) That such engineer failed to disclose to appellant his knowledge and information relating to the presence of rocks and boulders although specifically requested by appellee (Palmberg) to divulge to him any further knowledge or information as to subsoil conditions which might be helpful to appellee in preparing his bid; . . ."

In the present case, as distinguished from the *Walla Walla Port District v. Palmberg* case, *supra*, the appellee submitted no evidence nor does the record reflect any evidence from any source that:

1. The appellant had information in its possession re-

lating to debris or subsoil conditions that it did not reveal to the appellee.

2. There is no evidence in the record that the appellee requested the appellant to reveal such information as it had relating to debris or subsoil conditions. Even if the barest unsupported assumption is made that such a request was made, there is no evidence in the record, either direct or circumstantial, that the appellant did not reveal all the information that it had.

The error in admitting such evidence is patent. The fact that the appellee encountered debris in its dredging operations, and the fact that such debris adversely affected the appellee's dredging operations does not in any fashion or form support even by inference a conclusion or a finding of fact that the appellant had information with respect to the debris encountered or that it withheld such information from the appellee.

The appellee made no attempt to introduce evidence, either circumstantial or direct, that the appellant had failed to reveal to the appellee all it knew about the subsurface conditions in the Shelton harbor. *Appellee's statement to the court that it sought to introduce debris evidence for the purpose of showing a breach of duty was an intentional misrepresentation to the court for the sole purpose of bringing in through the back door that which it was, as a matter of law, prohibited from introducing directly.* Clearly, the appellee's witnesses' extensive testimony on the amount of debris encountered and the effect of debris on the appellee's operation was

prejudicial to the appellant. The introduction of such evidence occupied a substantial portion of the testimony introduced by the appellee. Such evidence should not have been admitted and its admission was prejudicial and erroneous.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 11

Plaintiff's Ex. No. 2 Contradicts the Written Contract Between the Parties. Its Admission Into Evidence Was in Violation of the Parol Evidence Rule, Which Is a Substantive Rule of Law in the State of Washington.

The court during the trial of the cause erroneously admitted into evidence plaintiff's Exhibit No. 2. This exhibit was a diagram prepared by the appellant and given to the appellee over a month before appellee's proposal was submitted to the appellant (Rt., p. 135, l. 25-p. 136, l. 2). This diagram contained an error. It was the appellee's position that it relied upon this diagram in submitting its bid to the appellant and that, because of the error contained in the diagram, it was injured.

The particular error contained in this diagram was the notation "350,000 Yds", contained within an enscribed area (referred to at the trial as the primary dredge area). (See diagram, Appendix I). The enscribed area contained 222,370 cubic yards when dredged to the indicated depth (Rt., p. 520, ll. 10-18) (Plaintiff's Ex. 8). It was the appellee's position at the trial of the cause that because of this error, the appellee was required to dredge in the area to the east of what was termed the primary dredge area. (See diagram, App. I)

The diagram was offered in evidence by the appellee for the reason:

> "The offer is made as being the plan, Exhibit 1, being the document by which the defendant designated the areas to be dredged; and also the document outlining the defendant's proposed dredging, as designated by you, and we take the position that this is the plan which designated the dredging to be done." "Statement of appellee's counsel to the court, Rt., p. 93, ll. 8-15) (Plaintiff's Exhibit 1 (not admitted) is essentially identical to Plaintiff's Exhibit 2 (admitted) (Rt. p. 83, ll. 4-10).)

On this ground the appellant's objections on the basis of the parol evidence rule to the admissibility of the diagram were overruled (Rt., p. 93, ll. 16-19).

It is the appellant's position that the court erred in overruling its objections to the admissibility of the diagram on the basis of the parol evidence rule for the following reasons:

1. The contract between the parties (which was prepared by the appellee's president) makes no mention of the diagram (Rt., p. 91, ll. 12-14). Consequently, the diagram cannot be considered part of the contract between the parties.

2. The contract between the parties does make reference to cross sections and surveys of the areas to be dredged and filled, which cross sections and surveys were furnished to the appellee (Rt., p. 443, l. 21 through p. 444, l. 10) by appellant approximately one month before the dredging commenced. These cross sections and surveys *which are referred to in the contract,* are complete,

but are contradicted by the diagram (plaintiff's Ex. 2) that the appellee sought to have admitted. These cross sections specifically indicate as an area to be dredged the area to the east of the primary dredge area. *This area was in fact dredged by the appellee exactly as indicated on the cross sections.*

The contract provides (defendant's Ex. A-1):

> "8. Measurement of quantities dredged shall be at your expense by measurement of the areas filled. *Plats or cross sections of surveys shall be given to us for checking before dredging commences* and within 30 days after completion of dredging operations." (Emphasis added)

(It is interesting to note that the appellee in relying upon the above diagram for recovery from the appellant claims that the appellant when giving the diagram to the appellee impliedly warranted the accuracy of its contents, and that its bid was based on that information, yet, in the contract that the appellee prepared, it made absolutely no reference to the diagram and specifically provided in the contract that:

> "Plats or cross sections of surveys shall be given to us *for checking before dredging commences . . .*"

It is more than a little inconsistent that the appellee's president should testify at the time of trial that he relied upon a diagram prepared by appellant in bidding the contract, when in fact his own written contract specifically provided that he wanted to check the appellant's cross sections and surveys.)

3. The written contract between the parties, together

with the cross sections therein referred to, contains no ambiguity with respect to any matters included on the diagram. Ambiguity arises only when the diagram is admitted.

It is the law of the State of Washington, as stated in the case of *Levinson v. Linderman,* 51 Wn.2d 855, 859, 322 P.2d 863, 866 (1958):

> "The applicable rule of law is stated in 17 C.J.S. 714, Section 298, as follows:
>
> "'As a general rule, sometimes by reasons of express statutory provision, where several instruments are made as part of one transaction, they will be read together, and each will be construed with reference to the other. This is true, although the instruments do not in terms refer to each other.'"

See also: *Paine-Gallucci, Inc., v. Anderson,* 41 Wn.2d 46, 246 P.2d 1095 (1952); *Standring v. Mooney,* 14 Wn. 2d. 220, 127 P.2d 401 (1942); *State ex rel. Noble v. Bowlby,* 74 Wash. 54, 132 Pac. 723 (1913).

It is the law that where reference is made in a contract to plans and specifications, they are incorporated into the contract according to the terms of the contract. *Hill & Combs v. First National Bank of San Angelo, Tex.,* 139 F.2d 740 (5th Cir. 1944); *Valley Const. Co. v. City of Calistoga,* 165 P.2d 521, 72 Cal. App.2d. 839 (1946); *Drock v. Great Atlantic & Pacific Tea Co.,* 22 N.E.2d 547, 61 Ohio App. 291 (1939).

The appellee's president was an experienced contractor. If the diagram (plaintiff's Ex. 2) that he now asserts as

a plan and specification were such, he would have incorporated it in his contract and would not have provided that the cross sections would be furnished to the appellee ". . . for checking before the dredging commences."

It was the appellee's theory that the written contract (defendant's Ex. A-1) is ambiguous and that the work it contracted to perform under the contract can only be identified by the introduction of plaintiff's Ex. 2. If this theory is believed, it is necessary to ignore the plain written language of the contract. It is not necessary to resort to the diagram (plaintiff's Ex. 2) to identify the work to be performed because the contract itself identified that work. The contract provides:

> "1. We, Palmberg Construction Co., shall furnish a 12-inch hydraulic dredge, fully operated, with all necessary auxiliary equipment, *including approximately 1,500 lineal feet of pipeline, for the work to be performed.*"

This paragraph of the contract prepared by the appellee identified the work to be performed by the appellee. It limits its obligations to dredge designated areas to those requiring no more than 1,500 lineal feet of pipeline. Subsequent to this contract being executed by all parties and in accordance therewith, the appellant furnished the appellee with surveys and cross sections of areas to be dredged, ALL OF WHICH REQUIRED THE USE OF LESS THAN 1,500 LINEAL FEET OF PIPELINE.

The contract required the appellant to furnish those surveys and cross sections to the appellee *for checking*

before dredging commenced. This was done. These surveys and cross sections specifically delineated the distances materials were to be moved, and the amounts of materials available in any given area. THE APPELLEE AT NO TIME MADE ANY OBJECTION TO THOSE SURVEYS OR CROSS SECTIONS.

In the present case it is clear that the contract between the parties and the cross sections that were furnished to the appellee (a month before dredging commenced) were made as part of one transaction. Following the general rule, then, as quoted by the Washington Supreme Court, the contract and the cross sections must be read and construed together. It is error to admit into evidence the diagram urged by the appellee (plaintiff's Ex. 2) for this diagram would contradict and vary the terms of the written contract between the parties, which, but for the diagram, is not ambiguous.

The diagram (plaintiff's Ex. 2) being evidence of prior or contemporaneous negotiations between the parties is parol evidence. It is the law that parol evidence may not be admitted to vary, contradict, or modify a written contract. *Seattle-First Nat. Bk. v. Pearson,* 63 Wn.2d 890, 389 P.2d 665 (1964); *Nat. Ind. Co. v. Smith-Gandy,* 50 Wn.2d 124, 309 P.2d 742 (1957); *Fleetham v. Schneekloth,* 52 Wn.2d 176, 324 P.2d 429 (1958).

In the case of *Vance v. Ingram,* 16 Wn.2d 399, 410, 133 P.2d 938, 944 (1943), the court stated:

> "It is a well-established rule of construction that, when parties adopt a written agreement as the ex-

> pression of their intentions, that instrument becomes the contract, and all negotiations and understandings previous thereto become merged into the agreement. Unless the contract as executed is ambiguous, or unless there exists some ground for rescission or reformation, the actual unexpressed intentions of the parties may not be considered to alter the terms of the written document. The fact that a party may have believed the effect of the agreement to be different than it actually is, will not, in and of itself, justify this court in setting aside or rewriting the contract for them."

And it is also the law of Washington that:

> "The parol evidence rule is not a rule of evidence, but of substantive law. Even though evidence which falls within the inhibition is admitted without objection, it is not competent and cannot be considered as having probative value."

Fleetham v. Schneekloth, supra, 52 Wn.2d at p. 179, 324 P.2d at p. 431. See also: *Mead v. Anton,* 33 Wn.2d 741, 207 P.2d 227 (1949).

The issue as to whether the appellee was entitled to recovery from the appellant because of the error contained within the diagram (plaintiff's Ex. 2) was submitted to the jury together with the other grounds upon which the appellee sought to recover from the appellant. The jury rendered a general verdict.

The admission of parol evidence under such a circumstance is under Washington law manifestly prejudicial error.

The Washington State Supreme Court in the case of *Farley v. Letterman,* 87 Wash. 641, 647, 152 Pac. 515,

517 (1915) stated:

> "The admission of this evidence was error, and since it was wholly at variance with the issues between the parties, and tended to contradict and vary the terms of the written lease, the admission was manifestly prejudicial to the appellants; and, since the verdict covers all the respondent's causes of action, and appellant's counterclaims in one general award, there must be a new trial."

The diagram (plaintiff's Ex. 2) was parol evidence inasmuch as it related to preliminary negotiations between the parties. Its admission into evidence was prejudicial error.

ARGUMENT ON ASSIGNMENT OF ERRORS NOS. 12, 13, 14, AND 15

The Appellee Wholly Failed to Prove By Any Credible or Substantial Evidence That It Had Suffered Damages or Excess Costs By Reason of Any Act or Acts of the Appellant.

At the close of the appellee's case in chief, pursuant to Federal Rules of Civil Procedure, Rule 50 (Rt. p. 688) and at the close of all testimony (Rt., p. 949), the appellant moved for a directed verdict on the grounds that the appellee had failed to submit sufficient evidence to support its right to a recovery from the appellant. After the jury rendered its verdict, the appellant moved for judgment in accordance with the motion for directed verdict or in the alternative, a new trial (Ct. p. 244-C). These motions were denied. An examination of the record clearly discloses that the trial court erred in refusing to grant either of these motions and that the verdict of the

jury granting judgment for the appellee is not supported by the evidence.

The appellee wholly failed to prove that it had suffered damages, or extra costs, because of any action or inaction on the part of the appellant. In fact, the appellee wholly failed to prove that the work it actually performed for the appellant was anything different than it had contracted to do.

At the time of trial, the appellee sought to prove that it had suffered damages or extra costs arising out of a number of separate grounds. These apparently were:

1. Alleged damages or extra costs suffered because the appellee was required to dredge in the area east of the primary dredge area as a result of there not being 350,000 yards in the primary area. (See diagram, App. I)

2. Alleged damages suffered because the appellee encountered debris in its dredging operations.

3. Alleged damages suffered because the appellant had not credited the appellee with the full amount of the materials that the appellee had placed in the fill area.

4. Alleged damages suffered as a result of the appellant requesting changes or additional work during the course of the appellee's operations.

5. Alleged damages suffered because of the appellee being required to pump materials for distances greater than those required under the contract.

According to the appellee's theory, all of the above

alleged items of damage resulted, or were a result of actions of the appellant.

Under the law of the State of Washington, once the fact of damage is proven, the actual amount of damages does not have to be proven with exacting certitude. The law of the State of Washington does, however, require that the *actual fact of damage* be determined with certainty. The Washington Supreme Court in *Gaasland Co. v. Hyak Lbr. Etc.*, 42 Wn.2d 705, 713, 257 P.2d 784, 788 (1953) quoted with approval the following statement of the law:

> "'. . . but it is now generally held that the uncertainty which prevents a recovery is *uncertainty as to the fact of the damage and not as to its amount and that where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery* . . . 15 Am. Jur. 'Damages' 414, Sec. 23.'" (Emphasis added)

And also see, for cases holding that uncertainty as to the fact of damages is fatal to a plaintiff's claim: *Sund v. Keating*, 43 Wn.2d 36, 259 P.2d 1113 (1953); *Wenzler & Ward, Etc., Co. v. Sellen*, 53 Wn.2d 96, 330 P.2d 1068 (1958); *Dunseath v. Hallauer*, 41 Wn.2d 895, 253 P. 2d 408 (1953).

In the present case the appellee not only wholly failed to show the fact of damage with any degree of certainty, it also failed to submit evidence affording a reasonable basis for determining the amount of its alleged damages. This failure on the part of the appellee is clearly shown by examining the evidence with respect to each of the alleged items of damage above.

1. Alleged damages or extra costs suffered by appellee because there were not 350,000 cubic yards of material contained within the primary dredge area, and as a consequence appellee was required to dredge in the area to the east of the primary area.

The appellee's president testified that it was his opinion that the appellee suffered $35,000.00 damages or extra costs because of the fact that 350,000 cubic yards of material were not available to be dredged in the primary area (when dredged to a 12-foot level), and as a consequence, the appellee was required to dredge in the area to the east of the primary area (Rt., p. 374, ll. 9-23). However, it is abundantly clear that pursuant to the terms of the contract, the appellee was contractually obligated to dredge in the area to the east of the primary area. The appellee's president so testified. (Rt., p. 512, l. 19 through p. 513, l. 2).

The basic instrument of the written contract between the parties (defendant's Ex. A-1) was prepared by Mr. Palmberg, the appellee's president (Rt., 412, ll. 8-16).

The contract makes no mention of the diagram purportedly relied upon by the appellee. The contract did provide that:

> ". . . we (Palmberg) offer to perform dredging *in areas designated by you,* in accordance with the following stipulated provisions:" (Defendant's Ex. A-1, p. 1)

The appellee would have the court believe that the areas designated for dredging by the appellant were those indicated upon the diagram (plaintiff's Ex. 2). The contract makes no mention of the diagram or of any areas

to be dredged by the appellee. The contract does, however, expressly limit the areas that the appellant could designate and the responsibilities of the appellee by providing:

> "We, Palmberg Construction Co., shall furnish a 12 inch dredge, fully operated, with all necessary equipment *including approximately 1,500 lineal feet of pipeline for the work to be performed.*" (Defendant's Ex. A-1, p. 1, par. 1)

By this paragraph in the contract it prepared, the appellee specifically limited the work it was to perform and the areas it was to dredge to those requiring no more than 1,500 feet of pipeline.

The appellee further provided, in the contract it prepared, that:

> "*Plats or cross sections of surveys shall be furnished to us for checking before dredging commences,* and within 30 days after completion of dredging operations." (Defendant's Ex. A-1, p. 3, par. 8)

These cross sections were in fact furnished to the appellee before dredging commenced. These cross sections did designate the areas to be dredged and they also indicated the amount of materials available in each area. EACH OF THE AREAS INDICATED AS DREDGE AREAS ON THE CROSS SECTIONS FURNISHED TO THE APPELLEE BEFORE DREDGING COMMENCED, INCLUDING THE AREA TO THE EAST OF THE PRIMARY DREDGE AREA, COULD HAVE BEEN AND WERE IN FACT DREDGED BY THE APPELLEE USING PIPELINE DISTANCES OF LESS

THAN 1,500 LINEAL FEET. The appellee's leverman's logs (plaintiff's Ex. No. 26, a, b and c) kept by the appellee's dredge operator, contains entries showing the length of pipeline used by the dredge to do its work. These logs prove conclusively that the average length of pipeline used by appellee when dredging in the area east of the primary area was 1,200 to 1,300 lineal feet (see also Rt., p. 820). This average length was 200 to 300 feet below the length of pipe which the appellee was contractually obligated to furnish. The appellee dredged in the area to the east of the primary area using pipeline distances which were well within the identification of "work to be performed", as contained in the written contract between the parties.

The appellee may not recover additional compensation for doing that which it was contractually obligated to do. *Spearin v. United States, supra*, and *Maryland Casualty Co. v. Seattle, supra.*

The fact of damage was not proven; the appellant's motions for a directed verdict should have been granted.

Assuming only for argument that the appellee's contentions are correct and that it was not contractually obligated to dredge in the area to the east of the primary dredge area, but was required to dredge in that area because of the erroneous diagram, the record is clear that it suffered no damages by so dredging.

Under the law of the State of Washington, if a contractor is required to do work not called for under a contract, because of error in plans and specifications, he is

entitled to the extra cost incurred as a result of doing that work. *Maryland Casualty Co. v. City of Seattle, supra.*

Consequently, the appellee, in order to show the fact of damages, would have to have proven with certainty that it did in fact incur "extra costs" because of dredging in the area to the east of the primary area.

There is no question but that the appellee had to dredge yardages equal to that removed from the area east of the primary area in order to complete the contract. The only question to determine was if the appellee's cost of removing this yardage from the area east of the primary area was greater than its costs of removing yardages from areas which the appellee admits were within the contract.

The costs of operating a dredge are generally labor costs, dredge use, repairs, maintenance and supplies.

On September 6, 1961, almost six months after dredging ceased, the appellee furnished the appellant with a breakdown of costs it incurred at the Shelton, Washington operations. This cost breakdown sheet was put in evidence at the time of trial (plaintiff's Ex. 14). An examination and analysis of these sheets proves that the appellee did not experience any "extra costs" while dredging in the area to the east of the primary area.

The appellee's September 6th letter to the appellant (plaintiff's Ex. 14) proves that the appellee incurred costs in repair parts, supplies and miscellaneous to its dredges during the period January, 1960 to December

31, 1960, of $30,407.38. During that period of time the appellee's operating hours of its dredges (basis for payment) was 6,073 hours. (Appellee's statement to appellant of January 27, 1961, plaintiff's Ex. No. 31).

The appellee dredged in the area east of the primary area only during the period January 1, 1961 to March 28, 1961 (Rt., p. 928, ll. 15-19). Analysis of the costs sheets (September 6th letter) indicates that the appellee incurred costs in maintenance, repairs, subsistence and supplies to its dredges during that period of time in the amount of $1,377.60 and accrued operating hours during that period of 1,236 hours.

These facts, taken from the appellee's own records, prove the following:

Cost per hour of repair parts, miscellaneous supplies, etc., during the time that appellee was dredging in areas which it admits it was required to dredge under the contract (February 17, 1960 to December 31, 1960):

$30,407.39/6,073 operating hours=$5.02 per operating hour.

Cost of repair parts, supplies, etc. per operating hour during time that appellee was operating in the area east of the primary area:

$1,377.60/1,236 operating hours=$1.11 per operating hour.

Clearly, if the appellee's cost while operating in areas it admittedly was required to dredge under the contract was $5.02 per operating hour and its cost while operating

in an area it alleges it was not required to operate in under the contract were only ¼ of its normal costs ($1.11/$5.02), it did not incur any "extra costs" which it would be entitled to recover under the laws of the State of Washington.

The record also clearly proves that the appellee's labor and dredge use costs while operating in the area east of the primary area were substantially lower than when the appellee was operating in the primary area. The appellee's president, Mr. H. G. Palmberg, stated on the witness stand that as the dredge production goes down (yards per hour) the cost of production goes up (Rt., p. 347, ll. 7-8). Conversely, if production goes up, costs go down. The evidence submitted at the time of trial clearly shows that the appellee's production while operating in the area east of the primary area was substantially higher than when it was operating in the primary area. Consequently, in accordance with the appellee's own testimony, its costs must have been lower. The evidence in the record is as follows:

Yardage dredged from car ferry channel (Admitted Fact No. IV—Court's Instructions to Jury, p. 10, ll. 19-25)	35,000 yds.
Yardage dredged from primary area (From cross sections, plaintiff's Ex. 6, a-j; plaintiff's Ex. 8, Rt., p. 366, ll. 14-20)	222,370 yds.
	257,370 yds.

Total operating hours, car ferry channel and primary area (appellee's billing to appellant, dated August 8, 1960, plaintiff's Ex.

30, Admitted Fact No. V—Court Instructions to Jury, p. 11, ll. 1-12)	4,061 hours
Yards dredged per operating hour, car ferry channel and primary area, 257,370 yards/ 4,061 operating hours =	63.6 yd/hr
Yardage dredged from area east of primary area (Testimony of B. Kieburtz, Rt., p. 819, ll. 4-5)	107,000
Total operating hours in area east of primary area (total hours for project, 7,309—September 6th letter—plaintiff's Ex. 14—less hours to December 31, 1960, 6,073—appellant's January 27, 1961 letter—plaintiff's Ex. 31)	1,236 hours
Yardages dredged per operating hour, area east of primary dredge area, 107,000 yards/ 1,236 hours =	87.4 yd/hr

Accordingly, the appellee's production in the area east of the primary area was 37.5% greater than its production in the primary areas. (87.4 yds/hr minus 63.5 yds/hr = 23.9 yds/hr increase divided by 63.5 yds/hr = 37.5%.) These figures prove that the amount of time required by the appellee to dredge a yard of material in the area to the east of the primary area was 37.5% lower than the time required to move a yard of material when the appellee was dredging in the primary area. Correspondingly, the appellee's labor costs and dredge use cost were 37.5% lower when it was dredging in the area east of the primary area. If its costs were in fact lower, when dredging in the area to the east of the primary area, it could not have incurred any extra costs because of dredging in the area to the east of the primary area.

The above facts produced from the evidence at the time of trial demonstrate clearly that the appellee did not show the actual fact of its alleged damages and, in fact, did not suffer any such damages.

2. Alleged damages or excess costs because of changes in the method and manner of appellee's work at the request of the appellant.

The appellee during the course of the trial purported to show that it had suffered damages because of changes in the method and manner of its work done at the request of the appellant. The evidence relating to such damage or extra cost amounted only to the testimony of the appellee's president that it did in fact sustain such damage. However, upon cross-examination Mr. Palmberg testified as follows:

"Q. Mr. Palmberg, did you first inform the defendant that any of these changes that you are now talking about, that you have talked about in your direct examination caused any additional expense?

"A. (Mr. Palmberg) Well, I am sure that those were part of the discussions right along as the changes were being made, but there were offsetting factors.

"Q. There were offsetting factors that more or less compensated for whatever changes were asked, is that right?

"A. That is right." (Rt., p. 438, ll. 1-12)

By the appellee's own testimony it had already been compensated for any alleged changes. It is not entitled to double compensation.

The fact of damage or extra costs was not proven.

3. Alleged damages suffered because appellant had not credited appellee with the full amount of materials that the appellee had placed in the fill area.

At the time of trial, the appellee attempted to prove that the appellant had failed to credit it with all the materials that it had placed in the fill area.

The testimony of the appellee's president was that the appellee was required to dredge materials from 5 areas, namely:

	Amount Dredged
1. The primary area (Cf. cross sections, plaintiff's Ex. 6 a-j, plaintiff's Ex. 8, Rt., p. 366, ll. 6-20, p. 520, ll. 10-21)	222,370 cu. yds.
2. The car ferry area (Admitted Facts IV—Court's Instructions to Jury, p. 10, ll. 19-25)	35,000 cu. yds.
3. Substitute area—maximum (Testimony of H. G. Palmberg, Rt., p. 517, l. 16 through p. 518, l. 5)	80,000 cu. yds.
4. Log slip area—maximum (Rt., p. 520, l. 23 through p. 521, l. 6)	15,000 cu. yds.
5. East of primary area (Rt., p. 819, ll. 4-5)	107,000 cu. yds.
Total	459.000 cu. yds.

(In fact, the amount of materials dredged must be higher than the amount of materials placed in the fill because of loss during transit, and washback from the fill area. The contract provides that the appellee was to be paid on the basis of materials in the fill at time of measurement.

Measurement by amount of materials dredged is, of course, in the appellee's favor.)

The above figures show that the appellee dredged a maximum of 459,000 yards during its operations, yet the appellant in computing the amount due the appellee computed payment on the basis of 460,907 yards. The appellee made no objection to this figure until the time of trial.

Inasmuch as the appellee was paid on the basis of more yards than it could possibly have placed in the fill area, it cannot now complain that the appellant shorted it on its yardage measure.

In addition, the appellee submitted no evidence that the appellant did in fact short it on its yardage count. It did not submit any evidence of the fact of damage in this respect, and it submitted no evidence upon which the jury could form a reasonable basis for determining the amount of shortage, if any.

The fact of damage was not proven.

4. Alleged damages resulting from the appellee encountering debris in its dredging operations.

This matter is dealt with above. The contract between the parties specifically provides for the possibility of the appellee encountering debris in its dredging operations. THE APPELLEE IS NOT ENTITLED TO RECOVER ADDITIONAL COMPENSATION FOR DOING THAT WHICH IT WAS CONTRACTUALLY OBLIGATED TO PERFORM.

5. Alleged damages suffered because of the appellee being required to pump material for greater distances than those required in the contract.

The only evidence in the record of the appellee pumping material greater distances than 1,500 feet as provided for in the written contract is concerned with the period of time that the appellee was dredging in the substitute area (Rt., p. 821, ll. 5-17). The only evidence submitted at the time of trial with respect to those distances in excess of 1,500 feet was to the effect that the reason for said distances was the lack of planning and skill on the part of the appellee (Rt., p. 810, l. 4 through p. 812, l. 16). The appellee is not entitled to recover for work in excess of that called for under the contract if that work was the result of its own lack of skill in performing the contractual obligations. 17A C.J.S. *Contracts*, Sec. 371 (1), p. 401, etc.

See also: *Spearin v. United States, supra; Maryland Casualty Co. v. City of Seattle, supra.*

The appellee wholly failed to prove by any credible or substantial evidence that it in fact suffered damages or extra costs in performing the work it contracted to do, which were the result of or due to any action or inaction on the part of the appellant. Since the appellee had wholly failed to prove its case, it was error on the part of the trial court to submit the cause to the jury. It was further error on the part of the trial court to deny the appellant's motions for a directed verdict. The law of Washington with respect to verdicts is clear. In the case of *Arnold v. Sanstol*, 43 Wn.2d 94, 98, 260 P.2d 327,

329 (1953), the court stated:

> "A verdict will not be set aside unless the court can say, as a matter of law, that there is neither evidence nor reasonable inference from the evidence to support the verdict."

and at 43 Wn.2d 94, 99, 260 P.2d 327, 330:

> "A verdict cannot be founded on mere theory or speculation. If there is nothing more tangible to proceed upon than two or more conjectural theories, under one or more of which a defendant would be liable, and under one or more of which there would be no liability upon him, a jury will not be permitted to conjecture how the accident occurred."

Although the above language is taken from an accident case, the basic theory applies. Although the appellee's expert witnesses and the appellee's president testified that the appellee might have suffered damages because of acts of the appellant, the facts admitted in the case clearly show that the appellee suffered no extra costs or damages because of acts of the appellant. The jury should not have been allowed to speculate as to the appellee's right to recover from the appellant when as a matter of law the appellee was not entitled to a recovery.

Where the plaintiff's evidence not only fails to prove the amount or extent of damages, as well as the actual fact of damages, the case should be dismissed. *Hodges v. Gronvold*, 54 Wn.2d 478, 341 P.2d 847 (1959).

ARGUMENT ON ASSIGNMENT OF ERROR NO. 16

The Verdict of the Jury Denying the Appellant Recovery from the Appellee on Its Counterclaim Is Against the Weight of the Evidence and Manifestly Incorrect.

Although the two original documents comprising the written contract between the parties makes no reference to a time for completion of the work which was to be performed by the appellee, plaintiff's Ex. 10, comprising a modification to the original contract made prior to the time work commenced, specifically provides that the contracted work was to be completed by the appellee by June 1, 1960. The language of the agreed modification is:

> "Supplemental to the terms and conditions included in purchase order #52471-PE for fill by hydraulic dredging the following terms are added to cover the operation of a second 12" dredge *in order to permit completing the fill operation by June 1, 1960."* (emphasis added)

In addition, the unrefuted testimony of one of the appellant's witnesses, Oliver Ashford, was that the appellee had promised completion by June 1, 1960 (Rt., p. 759, ll. 12-18).

Upon receipt of the above modification, the appellee did in fact furnish a second dredge to the operation causing the appellant to incur additional mobilization costs of $4,500.00 and additional fuel costs. The dredging was not completed by June 1, 1960, and in fact was not completed until March 21, 1961, nine months after the promised date of completion. There is no controversy in

the record as to these facts.

The appellant submitted evidence at the time of trial that because of the appellee's failure to complete its dredging and filling operations by the time stipulated, it suffered damages. These damages consisted of maintenance of equipment on the dredge site, maintenance of a crew, supervision and engineering costs, power costs (Rt., p. 765, ll. 14-25), and loss of use of the fill site (Rt., p. 766, ll. 1-4). These damages, according to the unrefuted testimony of the appellant, amounted to $2,000.00 per month. The appellant's cost sheets for expenses incurred subsequent to June 1, 1960, were admitted into evidence (defendant's Ex. A-16).

Each of the above-mentioned items of damages resulted as a consequence of the appellee's failure to complete the filling operations within the stipulated time.

The measure of recovery under Washington law for breach of a contract and, specifically, delay in completion, is consequential damages.

Lidral v. Sixth & Battery Corp., 47 Wn.2d 831, 290 P.2d 459 (1955).

Clearly, the appellant's additional costs of maintaining machinery, crews, supervisory personnel and loss of use of its land, and investment were within the contemplation of the parties.

The evidence of such damages and the amount thereof is clear and unrefuted in the record. The jury's verdict denying recovery is erroneous.

CONCLUSION

The appellant does not attempt to question appellee's right to sue in a court of law if it feels itself aggrieved. It is, however, the appellant's position that if it is to be subjected to litigation at the hands of the appellee, it is entitled to the protection of the law, enforcement of its contract rights and a trial only of those genuine issues that exist between it and the appellee.

These guarantees and protections are precisely what the appellant did not receive during the trial of the above cause. The trial court's complete disregard of the written contract between the parties, its admission of prejudicial evidence, which was not relevant to the issues properly before the jury, and which as a matter of law should have been excluded, had the effect of compelling the appellant to try a matter which had little relationship to the legitimate controversy (if any) between the parties.

In addition, the court's instructions to the jury were in significant part most favorable to the appellee, and not supported by even a scintilla of evidence. Many of the court's instructions were blatantly prejudiced in favor of the appellee and were contrary to law.

The net effect is that the appellant was deprived of its right to a fair trial and to the protection of the law.

The appellant respectfully submits that the judgments rendered in the trial court should be reversed and the appellee's complaint dismissed.

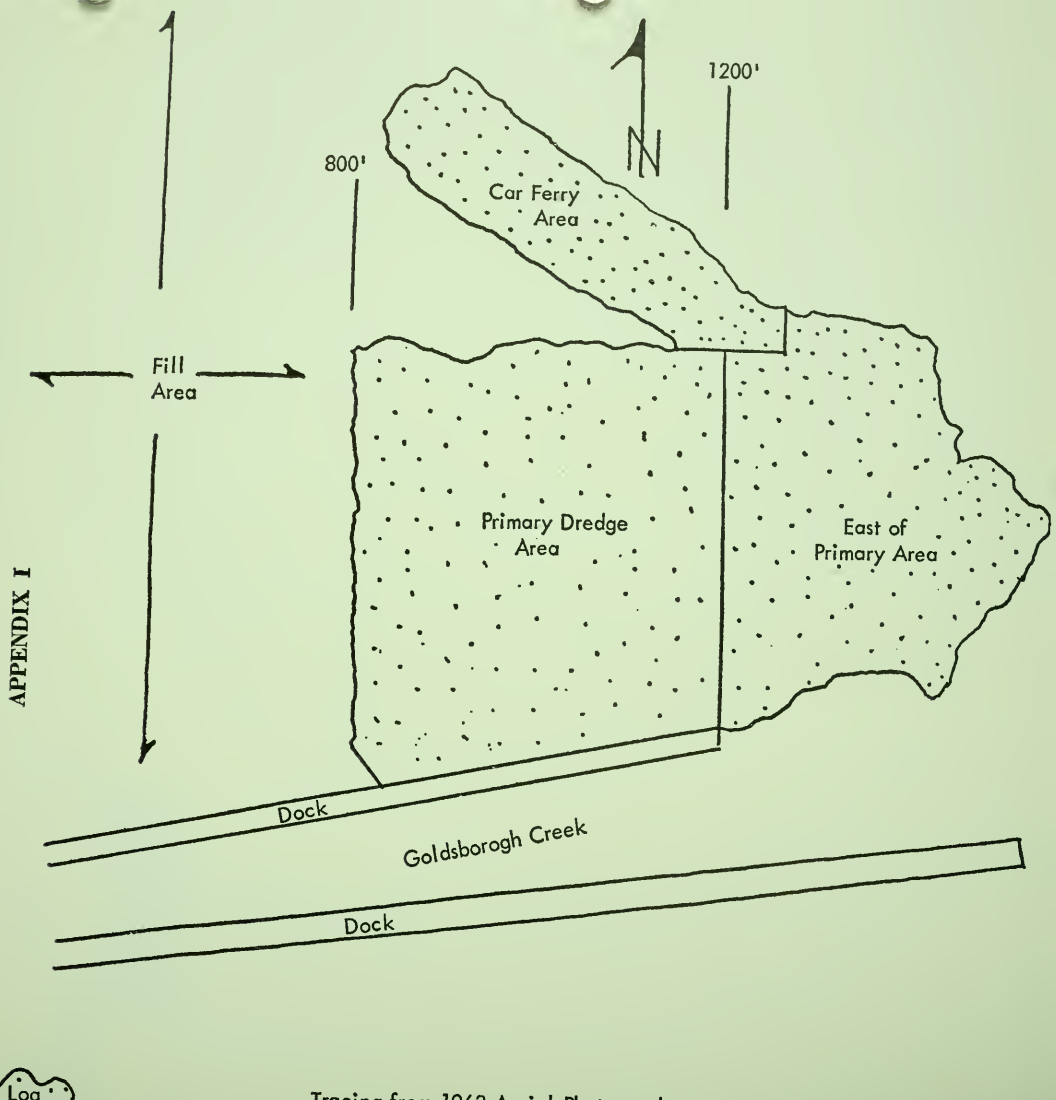
Respectfully submitted,

RYAN, ASKREN, CARLSON, BUSH & SWANSON
Attorneys for Appellant

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

DALE E. KREMER
Of Counsel for Appellant



APPENDIX I

Log Pond Area

Tracing from 1962 Aerial Photograph of Shelton, Washington Harbor Area

Scale 1" = 200'

Stippled Areas Represent Areas Dredged

Substitute Area

APPENDIX NO. 2

Numerical Designation In Reporter's Transcript of Instructions to Which Error Is Assigned	*Numerical Designation of Court's Instructions to Which Objection Was Made at Time of Trial*
7	5
20	12
22	14
24	16
25	17
27	19
28	20

APPENDIX NO. 3

All References Are to Reporter's Transcript of Proceedings

PLAINTIFF'S EXHIBITS

	Identified Page	*Offered Page*	*(A) Admitted or (R) Rejected Page*
Exhibit 1	82	88	R— 94
Exhibit 2	82	88	A—134
Exhibit 3	105	168	A—168
Exhibit 4	166	322	A—322
Exhibit 5	177	180	A—180
Exhibit 6-a thru 6-j	199	202	A—202
Exhibit 7	205	207	A—207
Exhibit 8	229	321	A—231
Exhibit 9	238	240	A—240
Exhibit 10	238 (241)	241	A—241
Exhibit 11	238 (242)	244	A—244
Exhibit 12	238 (242)	244	A—245
Exhibit 13	238 (245)	245	R—250
Exhibit 14	238 (250)	251	A—262
Exhibit 15	238 (251)	251	A—252
Exhibit 16	238 (252)	252	A—252
Exhibit 17	238 (271)	271	A—274*
Exhibit 18	238 (274)	275	A—275*
Exhibit 19	238 (275)	276	A—276*
Exhibit 20	238 (277)	277	A—277
Exhibit 21	238 (278)	279	A—279
Exhibit 22	238 (280)	280	A—280
Exhibit 23	238 (281)	Not Offered	
Exhibit 24	238	Not Offered	
Exhibit 25	261	267	A—267*
Exhibit 26a, b, c	320 (329)	329	A—332
Exhibit 27	334	336	A—336
Exhibit 28	340	341	A—342
Exhibit 29	340 (342)	342	A—342
Exhibit 30	355	357	A—357

*For limited purposes.

PLAINTIFF'S EXHIBITS—*Continued*

	Identified Page	*Offered* Page	*(A) Admitted or (R) Rejected* Page
Exhibit 31	354 (356)	357	A—357
Exhibit 32	373 (377-378)	379	A—379
Exhibit 33	388	388	A—388
Exhibit 34	564	565	A—566
Exhibit 35	564	565	A—566
Exhibit 36	647 (652)	648 (661)	A—661*
Exhibit 37	648	661	A—661*
Exhibit 38	947	947	A—947

DEFENDANT'S EXHIBITS

	Identified Page	*Offered* Page	*(A) Admitted or (R) Rejected* Page
Exhibit A-1	90	99	A— 99
Exhibit A-2	303 (305)	305	A—305
Exhibit A-3	398	399	A—399
Exhibit A-4	429	430	A—430
Exhibit A-5	456	486	A—487*
Exhibit A-6	459	460	A—460
Exhibit A-7	464	465	A—465
Exhibit A-8	489	490	A—491
Exhibit A-9	493	Not Offered	
Exhibit A-10	496	Not Offered	
Exhibit A-11	514	Not Offered	
Exhibit A-12	567	568	A—568
Exhibit A-13	568	570	A—570
Exhibit A-14	570	571	A—571
Exhibit A-15	724	Not Offered	
Exhibit A-16	824	832	A—832
Exhibit A-17	865	Not Offered	
Exhibit A-18	928	930	A—931

*For limited purposes.